

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAY 14 2007

COURT OF APPEALS
DIVISION TWO

JAMES M.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY, JOSAPHINE
M., CODY M., and KACEE M.,

Appellees.

2 CA-JV 2006-0067

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil

Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J-174516

Honorable Nanette Warner, Judge

AFFIRMED

Frederick Lomayesva

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By William V. Hornung

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

B R A M M E R, Judge.

¶1 Appellant James M. appeals from the juvenile court's order terminating his parental rights to his children, Josaphine, born April 27, 2000; Cody, born March 5, 2002; and Kacee, born October 28, 2003.

¶2 James and the children's mother left the children at a shelter in November 2004 and were urged to seek substance abuse treatment. In May 2005, the mother returned for the children, but her sister returned them to the shelter some weeks later, stating she had been caring for them. Ultimately, the Arizona Department of Economic Security (ADES) took custody of the children because it appeared the parents had histories of methamphetamine abuse and could not care for the children; ADES filed a dependency petition in July. James admitted the petition allegations in October, and the children were adjudicated dependent. The court held a permanency hearing in July 2006. James did not appear at the permanency hearing, and the court approved changing the case plan to severance and adoption, directing ADES to file a motion to terminate parental rights. Shortly thereafter, ADES filed the motion, alleging James had abandoned the children, had abused or neglected them, and had refused or neglected to remedy the circumstances that caused them to be placed out of the home for nine months or longer. *See* A.R.S. § 8-533(B)(1), (B)(2), (B)(8)(a).

¶3 James did not appear at the initial severance hearing in August 2006 or the status hearing in September. At the initial severance hearing, counsel requested a jury trial on James's behalf, stating she thought, but was not certain, that James was in jail. She added

that, other than one telephone call, she had had no contact with James since a hearing in April. The court granted counsel's request for an order to transport James to the next hearing if he were still incarcerated and further admonished James to "be present" at the September status hearing.

¶4 At the status hearing in September, the court asked counsel where James was; counsel responded, "[W]e have not had any contact with the father since July of this year, so I don't know his whereabouts." The court was concerned that James was in jail, but his counsel informed the court that James had actually been released before the August 10 initial severance hearing. Counsel for ADES added that she had served the motion on James through counsel in accordance with the rules and had learned James had been released from jail on August 3. Ascertaining from ADES that it wished to proceed, the court asked James's counsel for his position; counsel responded he had none, "not having any contact with our client."

¶5 At the beginning of the severance hearing, the court found James had been served the motion to terminate his rights "as permitted by the rule." The court added, "He has not maintained contact with his attorney or with the Department, and he has been released [from jail] . . . 45 days ago." The court deemed the allegations in the motion admitted and proceeded with the hearing, at which the case manager testified and an exhibit was admitted. At the end of the hearing, the court again asked James's counsel for his position; he reiterated that there had been no contact with James and he had no position.

The court then terminated James's parental rights on all grounds alleged in ADES's motion. This appeal followed.

¶6 James contends that serving the motion to terminate his rights through counsel was insufficient. Specifically, he argues the juvenile court erred by failing to determine whether service of ADES's motion "through counsel was appropriate in light of *Mara M. v. Arizona Department of Economic Security*, 201 Ariz. 503, 38 P.3d 41 (App. 2002)." And, James asserts "the court did not calculate whether service through counsel was reasonable in light of the parent's lack of contact with counsel and his apparent incarceration in Bisbee, Arizona." First, as ADES points out, because James did not raise this issue below, the juvenile court was deprived of the opportunity to address it and correct any arguable deficiency. Consequently, the issue was waived. *See generally In re Pima County Juvenile Action No. S-113432*, 178 Ariz. 288, 292, 872 P.2d 1240, 1244 (App. 1993) (father waived challenge to competency of social workers' testimony by failing to object in juvenile court). And, even if not waived, the issue is without merit and not fundamental error as James contends in his reply brief.

¶7 A party directed to file a motion for termination, *see* A.R.S. § 8-862(D)(1), is required to "serve the motion on all parties as prescribed in rule 5(c), of the Arizona rules of civil procedure." A.R.S. § 8-863(A); *see* Ariz. R. P. Juv. Ct. 64(D)(2). And Rule 5(c)(1), Ariz. R. Civ. P., 16A A.R.S., Pt. 1, provides that, "[i]f a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the

party.” In *Mara M.*, the court held that “a motion to terminate a parent’s rights, being in furtherance of the exercise of the juvenile court’s continuing authority, need not be served personally on the parent or by publication.” 201 Ariz. 503, ¶ 22, 38 P.3d at 45 (citations omitted). Rather than support James’s claim of error, *Mara M.* supports the propriety of the manner in which service was effected here. As the court there stated, when a parent has disappeared, service upon counsel is “a means reasonably calculated . . . to notify the parent and protect [the parent’s] rights” *Id.* ¶ 28.

¶8 The record shows James had been personally served with the dependency petition and related orders. He was apprised that failure to appear at proceedings involving his children could result in the termination of his rights. It is clear that he failed to maintain contact with counsel and the case manager. Although, at the time of the initial severance hearing in August 2006, counsel thought James was in jail, he had already been released. Yet James did not contact counsel or make any effort to determine the status of the proceedings involving his children. The case manager testified at the severance hearing that James had not engaged in services offered for him to attain the initial case plan goal of reunification, he never complied with the case plan requirements, he had not been in contact with her though he knew how to reach her, and he had not visited the children since November 2005. Thus, the “prolonged lack of contact with counsel” James refers to in his opening brief was his own doing and made it impossible for counsel to notify him before any

of the hearings. Nothing more was required of the juvenile court, and it did not err by proceeding with the hearing in James's absence.

¶9 The juvenile court's November 2006 order terminating James's parental rights to Josaphine, Cody, and Kacee is affirmed.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge